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No. 526

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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In its Motion to Dismiss or Affirm, appellee does not refute the showing made in the Jurisdictional Statement that the question presented is an important one in antitrust enforcement; and that the district court's refusal to adjudicate a violation, concededly shown by the record, solely because of its determination that injunctive relief is not required, would seriously weaken the effectiveness of the private treble-damage remedy. Rather, its primary argument is that this Court should dismiss the appeal because (1) the issue was neither urged by the Government in, nor decided by, the district court; and (2) the district court's findings, on which it based its denial of

injunctive relief, establish that this case is moot. Neither contention is valid.

1. Appellee argues (Motion to Dismiss or Affirm, 9–10) that "the parties concentrated exclusively upon the issue of injunctive relief throughout the [remanded] proceedings below," and it stresses (*id.*, 4) a statement in the Government's Supplemental Trial Memorandum that "the only issue now before the Court" is whether injunctive relief should be granted. That statement, however, is taken out of context, and we submit that the record shows that at no time during these proceedings did the Government ever abandon its prayer for relief in the complaint (Record, No. 20, Oct. Term, 1959, p. 7) that "the Court adjudge and decree that the defendant has combined and conspired in restraint of the trade and commerce hereinabove described in violation of Sections 1 and 3 of the Sherman Act." On the contrary, as we pointed out in the Jurisdictional Statement (pp. 6–7), the Government twice specifically stated in the court below that it was entitled not only to injunctive relief, but also to a judgment in its favor, *i.e.*, an adjudication of violation.

The complete statement in the Government's Supplemental Trial Memorandum was as follows (R. 17):

> Parke Davis, through its counsel, has indicated to the Court and the Government that it will defend on the sole ground of mootness. Therefore, the only issue now before the Court is whether Parke, Davis has clearly demonstrated that the abandonment of its policy was solely the result of economic conditions.

In other words, since appellee decided not to introduce any evidence directed to this Court's holding on the prior appeal that the Government's evidence established violation of the Sherman Act as charged, the only *contested* issue before the district court, we argued, was the need for injunctive relief. This statement by the Government *cannot* be construed as a waiver of the prayer in the complaint for an adjudication of violation—particularly since the point was subsequently specifically raised on two occasions in the district court, one of which as before the district court's initial ruling of July 5, 1960 (R. 3) that it would deny injunctive relief.[1] And, in view of the fact that appel-

[1] The Government's Reply Memorandum on Relief, filed about June 13, 1960, expressly urged that "judgment should be had against Parke, Davis and that the injunctive relief called for by the complaint be granted" (R. 34).

When the district court announced on July 5, 1960, that it "adhere[d] to its original decision and finds for the Defendant and against the United States, and denies injunctive relief" (R. 3), it further directed Parke Davis' counsel to submit proposed findings of fact and conclusions of law, and authorized Government counsel to then "bring any suggestions to the Court" (*ibid.*). On July 11, Parke, Davis submitted its proposed findings and conclusions (R. 84–89); it urged that the court find injunctive relief to be unnecessary and inappropriate, and that "[s]ince on the record as a whole the plaintiff is not entitled to the relief it seeks, the Complaint must be dismissed" (R. 89). Upon receipt of these proposals, the Government at once advised the court that it intended to submit objections, and did so early in the following week, including the request for an adjudication irrespective of denial of the injunction (R. 71–77, 95–96). Although the court had mailed its opinion to counsel the day before the Government filed its objections, the court considered them but found them unpersuasive. See text, *infra*, p. 4.

lee had indicated at the outset of the proceedings on remand that it would not challenge the holding of violation, it is hardly surprising, and certainly affords no basis for implying a waiver, that the Government did not further stress the point that it was entitled to an adjudication of such violation.

Nor can it fairly be said that the district court did not pass upon the issue. While the court did not deal with the question of adjudication in its findings and opinion, such relief was a part of the Government's prayer for relief. When the court denied relief, it necessarily denied all relief requested, including adjudication. Furthermore, the issue was specifically called to the court's attention in the Government's objections to appellee's proposed supplemental findings and conclusions (R. 71–77), which the district judge received the morning after he had mailed his opinion to counsel (R. 95–96). The district judge "carefully considered" those objections, but advised Government counsel that "they made absolutely no difference in his mind, and that he did not intend to change his Opinion as a result of them" (*ibid.*). Thus, whether the objections be considered as relating to the proposed judgment (the purpose for which the Government submitted them), or as a petition for rehearing or motion to amend the judgment (as the court apparently treated them), it is beyond dispute that the court "carefully considered" but rejected the Government's contention (R. 77; see R. 72) that "it is entitled to a judgment in its favor, whether or not injunctive relief is granted."

2. Appellee, relying on the dictum in *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633, that a "case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated,' " argues (Motion to Dismiss or Affirm, 12) that mootness is here established by the district court's finding (Fdg. 14, App. A, Jur. St., 24) that there is no "reasonable probability or likelihood" that appellee will resume its illegal practices. The short answer to this contention is that while such a finding "may" render a case moot, the district court did not here hold the case to be moot. For although appellee urged that the action should be dismissed (R. 89, 90)—the correct disposition if the case were in fact moot—the trial court declined to do so. Instead, it merely denied the Government's request for injunctive relief (and, necessarily, also its request for an adjudication of illegality, see *supra*, p. 4), and thus retained jurisdiction of the case. Plainly, the district court did not view this case as moot, despite its findings as to the unlikelihood of resumption of the illegal practices.

In thus refusing to dismiss the case as moot, the trial court applied the basic principle that a case is not moot unless the controversy between the parties has been completely settled. Here the controversy is far from settled, since the Government is still seeking, and appellee is resisting, an adjudication that appellee has violated the law, as sought in the complaint. The Government, as "trustee for the public under the [Sherman] act" (*United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290, 309), is seeking

such an adjudication both to aid the prosecution of private treble-damage suits by those who may have been injured by appellee's illegal actions, and also to facilitate its own proceedings. See Jurisdictional Statement, 8–13. Since there is thus a "truly adversary" relationship between the litigants, "the principal policy basis for the doctrine of mootness" (Mr. Chief Justice Warren, dissenting, in *Parker* v. *Ellis*, 362 U.S. 574, 592) is not applicable.

Both this Court and the lower courts have recognized that the need for an adjudication, which would serve as the basis for private damage litigation, dictates against a finding of mootness, even though the challenged practices had terminated. Thus, in *Southern Pac. R.R.* v. *Interstate Commerce Commission*, 219 U.S. 433, 452, this Court adjudicated the validity of an Interstate Commerce Commission rate order that had already expired, on the ground that the adjudication of whether the railroad's rates were excessive would furnish the basis for determination of reparations suits by shippers. In *United States* v. *Hartford-Empire Co.*, 73 F. Supp. 979, 981 (D. Del.), the Government was permitted to bring a suit to declare invalid for fraud a patent which had already expired. The important public purpose which would be served, the court explained, would be to enable former licensees or infringers to recover the royalties or damages that had been collected by means of the unlawful patent monopoly. And in *United States* v. *Railway Employes' Dept.*, 286 Fed. 228, 232, 233 (N.D. Ill.), even though the conspiracy in restraint of trade had been completely abandoned by the time of judgment, an

injunction was allowed the Government for the purpose of enabling the victims of the conspiracy to recover under Sections 4 and 5 of the Clayton Act (15 U.S.C. 15, 16). See also *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 353 (Clayton Act case in which the Court rejected the Government's suggestion of mootness against a bill in equity, because of potential damage suit); *Burrell* v. *Martin*, 232 F. 2d 33, 38 (C.A.D.C.) (adjudication of invalidity of vacated order for employee's discharge, because of the "practical effect on appellant's right to collect back pay" in a subsequent Court of Claims action).

CONCLUSION

The basic objective of Section 5 of the Clayton Act—"to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions" (*Emich Motors* v. *General Motors*, 340 U.S. 558, 568)—would be thwarted if, as appellee contends, an antitrust defendant can contest the alleged violation at trial but, if it loses, still avoid the consequences of an adjudication that the statute contemplates. See Jurisdictional Statement, 10–11. The issue is properly before the Court. The Motion to Dismiss or Affirm should be denied, and the Court

should note probable jurisdiction and decide the important question involving the public interest that this appeal presents.

Respectfully submitted.

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